

SAMPATH KUMAR

v.

INSPECTOR OF POLICE, KRISHNAGIRI
(Criminal Appeal No. 1950 of 2009)

MARCH 2, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

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Penal Code, 1860 - s 302 r/w s. 34 - Murder - Prosecution for - No eye-witness - Conviction by courts below - Based on ocular testimony of a witness and motive - Held: Conviction not justified - Evidence of the witness being in contrast with his police statement and not having independent corroboration, not reliable - Motive by itself cannot be a ground for conviction - However, in the facts of the case, even motive did not survive.

Evidence - Circumstantial evidence - Motive - Evidentiary value - Held: Motive by itself cannot be basis for conviction.

Criminal Trial - Discrepancies and contradictions in evidence - Distinction between.

The appellants-accused were prosecuted for having caused death of one person. There was no eye-witness to the incident. The prosecution case was that the deceased had a love affair with the sister of one of the accused which was not approved by two of the accused. The trial court convicted all the three accused relying on the testimony of PW7 who stated that on the night of the occurrence, he was sleeping with the deceased, and on hearing a sound, when he woke up, he saw the accused persons there. Trial court also based the conviction on motive. High Court upheld the conviction. Hence the present appeals.

A Allowing the appeals, the Court

B HELD: 1. The prosecution has not proved its case
entirely upon the deposition of PWs. 1, 2, 3 and 7. Of these
depositions PWs. 1, 2 and 3 are not admittedly eye-
witnesses to the occurrence, nor have they stated
anything against the appellants except that the deceased
was fond of sister of one of the accused and wanted to
marry her, which was not to the liking of her brother.
C [Paras 16 and 8] [297-F-G; 302-E]

D 2. The statement made by PW7 is in complete
contrast with the statement made by him before the
Police where the witness stated nothing about having
seen the appellants standing near the deceased around
the time of the incident. This omission is of very vital
character. What affects the credibility of the witness is
that he did not in his version to the police come out with
what according him was the truth, but withheld it for a
E period of five years till he was examined as a prosecution
witness in the court. Reliance upon the deposition of a
witness who has made such a material improvement in
his version is wholly unsafe unless it is corroborated by
F some other independent evidence that may probabilize
his version. PW 7 is not a chance witness who had no
reason to be found near the deceased at the time of the
occurrence. What makes it suspect is that the witness
has, despite being a natural witness, made a substantial
improvement in the version without there being any
G acceptable explanation for his silence in regard to the fact
and matters which was in his knowledge and which
would make all the difference in the case. The Court
would, therefore, look for independent corroboration to
his version, which corroboration is not forthcoming. All
H that is brought on record by the prosecution is the

presence of a strong motive but that by itself is not enough to support a conviction especially in a case where the sentence can be capital punishment. [Paras 13, 8 and 14] [297-H; 298-A; 300-A-B; 301-A-C] A

Sharad Birdhichand Sarada v. State of Maharashtra (1984) 4 SCC 116; 1985 (1) SCR 88; *Aftab Ahmad Ansari v. State of Uttaranchal* (2010) 2 SCC 583; 2010 (1) SCR 1027; *Narayan Chetanram Chaudhary and Anr. v. State of Maharashtra* AIR 2000 SC 3352:2000 (3) Suppl. SCR 104; *State of Himachal Pradesh v. Lekh Raj and Anr.* AIR 1999 SC 3916 :1999 (4) Suppl. SCR 286; *State of Haryana v. Gurdial Singh and Pargat Singh* AIR 1974 SC 1871: 1974 (3) SCR 6; *Kehar Singh and Ors. v. State Delhi Administration* AIR 1988 SC 1883: 1988 (2) Suppl. SCR 24 - relied on. B
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3. Although, according to the appellants the question of one the appellants having the motive to harm the deceased for falling in love with his sister, did not survive once the family had decided to offer her in matrimony to the deceased. Yet even assuming that the appellant had a motive for physically harming the deceased, that may be an important circumstance in a case based on circumstantial evidence but cannot take the place of conclusive proof that the person concerned was the author of the crime. One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the appellant but suspicion, howsoever strong, also cannot be a substitute for proof of the guilt of the accused beyond a reasonable doubt. [Para 15] [302-A-D] E
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N.J. Suraj v. State represented by Inspector of Police (2004) 11 SCC346; *Santosh Kumar Singh v. State through CBI.* (2010) 9 SCC 747: 2010 (13) SCR 901; *Rukia Begum v. State of Karnataka* AIR 2011 SC 1585: 2011 (4) SCR 711; *Sunil Rai @ Paua and Ors. v. Union Territory, Chandigarh* H

A AIR 2011 SC 2545- relied on.

Vadivelu Thevar v. The State of Madras AIR 1957 SC 614: 1957 SCR981; *Lallu Manjhi v. State of Jharkhand* AIR 2003 SC 854: 2003 (1) SCR 1 - referred to.

B Case Law Reference:

	1985 (1) SCR 88	Relied on	Para 6
	2010 (1) SCR 1027	Relied on	Para 7
C	2000 (3) Suppl. SCR 104	Relied on	Para 9
	1999 (4) Suppl. SCR 286	Relied on	Para 10
	1974 (3) SCR 6	Relied on	Para 10
D	1988 (2) Suppl. SCR 24	Relied on	Para 11
	1957 SCR 981	Referred to	Para 12
	2003 (1) SCR 1	Referred to	Para 13
	2004 (11) SCC 346	Relied on	Para 14
E	2010 (13) SCR 901	Relied on	Para 14
	2011 (4) SCR 711	Relied on	Para 14
	AIR 2011 SC 2545	Relied on	Para 14

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1950 of 2009.

G From the Judgment & Order dated 30.04.2009 of the High Court of Judicature at Madras in Criminal Appeal No. 1008 of 2007.

WITH

CrI. A. Nos. 66 & 1205 of 2010.

H K. Kanagaraj, P. Ramesh, Y. Arunagiri, Rakesh K.

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KRISHNAGIRI

Sharma, P. Vinay Kumar, V. Ramasubramanian for the Appellant. A

M. Anbalagan (for B. Balaji) for the Respondent.

The Judgment of the Court was delivered by B

T.S. THAKUR, J. 1. These appeals by special leave call in question the correctness of an order dated 30th April 2009 passed by the High Court of Madras, whereby Criminal Appeal No. 1008 of 2007 filed by the appellants against their conviction under Section 302 read with Section 34 IPC has been dismissed and the sentence of imprisonment for life awarded to them by the trial Court upheld. C

2. Briefly stated, the prosecution case is as under: The appellants, namely, Shanmugam, Velu and Sampath Kumar were close friends of the deceased-Senthil Kumar and Palani (PW7). Appellant-Velu has a younger sister, named, Usha who, according to the prosecution story, had fallen in love with the deceased-Senthil Kumar and wanted to marry him. Appellant-Velu did not approve of the said relationship and had asked appellant-Shanmugam to convey to the deceased-Senthil Kumar to keep off Usha or else he would break his hands and legs. In July 2002, appellant-Velu appears to have come on leave from his army services and during this period he and his mother-Balammal are said to have informed Murugambal (PW2)- mother of the deceased, sister-Lakshmi (PW3) and her husband-Selvam (PW1) that they had decided to give Usha in marriage to the deceased-Senthil Kumar. Further discussion regarding the marriage was, however, deferred till the passing of the Tamil month Adi, considered inauspicious for finalisation of matrimonial alliance. On 27th July, 2002 i.e. two days after the marriage proposal was made, Ramesh (PW9) was employed to paint the house of Lakshmi (PW3) when he saw the deceased-Senthil Kumar and Usha embracing one another in one of the rooms of the house. According to Ramesh (PW9), even the appellant-Shanmugam saw Usha and Senthil Kumar D
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A in a romantic embrace. The appellant-Shanmugam was also, according to the prosecution, one of the suitors of Usha and had a one-sided affection for her. On the following day, i.e. 28th July, 2002 PWs. 1 to 3, their neighbour and the appellant-Shanmugam went to a theatre to see a movie and returned

B home around 9.30 p.m. While Selvam (PW1), Murugambal (PW2) and Lakshmi (PW3) retired to bed inside the house after dinner, the deceased-Senthil Kumar and Palani (PW7) slept as usual in the verandah of the house. The appellant-Shanmugam also used to sleep with them but for some reason he did not

C turn up to do so on that day. At about 2.45 a.m. on the night intervening 28th and 29th July, 2002, Palani (PW7) heard the sound of a stone being thrown. He woke up to see the appellant-Shanmugam standing near the head of the deceased and the remaining two appellants also standing close by. The

D prosecution case is that Palani (PW7) was threatened by the appellants not to disclose to anyone regarding anything for otherwise they would kill him also. At this, Palani (PW7) shouted and ran to hide himself on the rear side of the house. In the meantime, PWs 1 to 3 who were sleeping inside the house also

E awoke upon hearing the noise and started shouting for help. This woke up their neighbour (PW8) in the opposite house who went over to the house and opened the door to help them come out. PWs 1 and 8 then went to the rear side of the house to

F find the appellant-Shanmugam lying beside a plantain tree with his hands tied with a cloth. It was also noticed on removing the blanket covering the deceased that someone had smashed his head with a stone which was lying at his side. When the appellant-Shanmugam was asked as to who had beaten him and thrown him behind the house, he stated that it was some stranger who had done so. Senthil was rushed to the hospital

G but died en-route. Selvam (PW1) went to the police station and lodged an oral complaint. The police registered a case under Sections 302 and 324 IPC.

H 3. After completion of the investigation the police filed a charge-sheet against the appellants accusing them of

committing the murder of Senthil Kumar. The appellants were then committed to the Sessions Judge, where they pleaded not guilty and claimed trial. At the trial the prosecution examined as many as 18 witnesses to prove its case. The Sessions Judge eventually came to the conclusion that the prosecution had proved its case beyond a reasonable doubt and accordingly convicted the appellants for the murder of the deceased-Senthil Kumar and sentenced them to undergo imprisonment for life under Section 302 read with Section 34 IPC. They were also sentenced to pay a fine of Rs.2,000/- each and in default of payment of fine, to undergo further rigorous imprisonment for two years. The Sessions Judge based his conviction primarily on the strong motive which appellants Shanmugam and Velu had to do away with the deceased due to his love affair with Usha. The Sessions Judge relied heavily upon the deposition of Palani (PW7) and the letter Exh. P-22 allegedly written by appellant-Shanmugam to the mother of the deceased, Murugambal (PW2) accusing appellant-Velu to be the person responsible for the death of the deceased.

4. Aggrieved by their conviction and sentence imposed upon them, the accused person preferred Criminal Appeal No.1008/2007 before the High Court of Madras which appeal has been dismissed thereby confirming the conviction and sentence recorded by the trial Court. The High Court held that while the deposition of Palani (PW7) was reliable, letter Exh. P-22 allegedly written by the appellant-Shanmugam to the mother of the deceased, Murugambal (PW2) was not. The confessional statement was held to be inadmissible having been produced after the statement of the accused persons had been recorded under Section 313 Cr.P.C. Independent of the said document, the High Court felt that the evidence on record formed a complete chain of circumstances that unerringly pointed to the guilt of the appellants. The present appeals assail the correctness of the said judgment as noticed above.

5. Mr. K. Kanagaraj, learned senior counsel for the

A appellant strenuously argued that the trial Court as also the High Court had fallen in error in holding that the charge against the appellants had been proved beyond a reasonable doubt. He urged that the entire case was based on circumstantial evidence and that the courts below had failed to keep in view the legal requirements attracted to cases that are based on circumstantial evidence. He further argued that the deposition of Palani (PW7) was not reliable for reasons more than one and the trial Court as also the High Court had committed an error in ignoring those reasons. The fact that there was a motive, assuming that any such motive had been established in the present case, was also not sufficient by itself to justify the conclusion that the appellants were responsible for the murder of the deceased.

D 6. The legal position regarding the standard of proof and the test which the circumstantial evidence must satisfy is well-settled by a long line of decisions of this Court. It is unnecessary to burden this judgment by making reference to all such decisions. We are content with reference to some of those decisions. In *Sharad Birdhichand Sarda v. State of Maharashtra* (1984) 4 SCC 116, this Court laid down the following five tests to be satisfied in a case based on circumstantial evidence:

F “(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

G (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) The circumstances should be of a conclusive nature and tendency.

H (4) They should exclude every possible hypothesis except the one to be proved, and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused." A

7. The decision of this Court in *Aftab Ahmad Ansari v. State of Uttaranchal* (2010) 2 SCC 583 is a timely reminder of the abovementioned requirements in the following words: B

"In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts, by itself/themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be." C D E

8. Coming to the facts of the present case, the prosecution relies entirely upon the deposition of PWs. 1, 2, 3 and 7. Of these depositions PWs. 1, 2 and 3 are not admittedly eye-witnesses to the occurrence, nor have they stated anything against the appellants except that the deceased was fond of Usha and wanted to marry her which was not to the liking of her brother-Velu, the appellant before us. It is only the deposition of Palani (PW7) that holds the key to whether the appellants are guilty or innocent. According to this witness who was sleeping with the deceased in the verandah of the house of PWs 1 to 3, at about 2.45 a.m. at night he heard a sound that F G H

A woke him up. He also noticed the appellants standing near the deceased. According to the witness, the appellants threatened him not to disclose anything to anyone otherwise he would meet the same fate. The witness, however, made no disclosure to PWs. 1, 2 and 3 who were inside the house, even when they

B had been woken up because of the sound and wanted to come out but could not because the door was bolted from outside. He made no disclosure of what he had seen even after the police had arrived at the scene after the registration of the case. In his statement before the police under Section 161 Cr.P.C.,

C Palani (PW7) made no such accusations against the appellants nor did he disclose to anyone that he had seen the accused persons on the spot around the time of the commission of the offence. It was only five years after the occurrence that the witness for the first time disclosed in the

D Court the story about his having seen the appellants standing near the deceased when the former woke up on account of the noise of a stone falling hard on the ground. The witness did not offer any explanation, much less a cogent and acceptable one for his silence for such a long period. His assertion that he was

E scared by the appellants even after they had been taken into custody by the police and, therefore, did not reveal anything about the actual events till he had the courage to come to the Court to make a statement, is hard to believe. At any rate, reliance upon the deposition of a witness who has made such a material improvement in his version is wholly unsafe unless

F it is corroborated by some other independent evidence that may probalimize his version.

9. In *Narayan Chetanram Chaudhary & Anr. v. State of Maharashtra* (AIR 2000 SC 3352), this Court held that while

G discrepancies in the testimony of a witness which may be caused by memory lapses were acceptable, contradictions in the testimony were not. This Court observed:

H "Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony

of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the Court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution become doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person.”

10. The difference between discrepancies and contradictions was explained by this Court in *State of Himachal Pradesh v. Lekh Raj and Anr.* (AIR 1999 SC 3916). Reference may also be made to the decision of this Court in *State of Haryana v. Gurdial Singh & Pargat Singh* (AIR 1974 SC 1871), where the prosecution witness had come out with two inconsistent versions of the occurrence. One of these versions was given in the Court while the other was contained in the statement made before the Police. This Court held that these are contradictory versions on which the conclusion of fact could not be safely based. This Court observed:

“The present is a case wherein the prosecution witnesses have come out with two inconsistent versions of the occurrence. One version of the occurrence is contained in the evidence of the witnesses in court, while the other version is contained in their statements made before the police...In view of these contradictory versions, the High Court, in our opinion, rightly came to the conclusion that the conviction of the accused could not be sustained.”

11. Reference may also be made to the decision of this Court in *Kehar Singh and Ors. v. State (Delhi Administration)* AIR 1988 SC 1883. This Court held that if the discrepancies between the first version and the evidence in Court were material, it was safer to err in acquitting than in convicting the accused.

A 12. In the present case the statement made by Palani (PW7) is in complete contrast with the statement made by him before the Police where the witness stated nothing about having seen the appellants standing near the deceased around the time of the incident. This omission is of very vital character.

B What affects the credibility of the witness is that he did not in his version to the police come out with what according him is the truth, but withheld it for a period of five years till he was examined as a prosecution witness in the Court. This Court in *Vadivelu Thevar v. The State of Madras* (AIR 1957 SC 614)

C classified witnesses into three categories, namely, (i) those that are wholly reliable, (ii) those that are wholly unreliable and (iii) who are neither wholly reliable nor wholly unreliable. In the case of the first category the Courts have no difficulty in coming to the conclusion either way. It can convict or acquit the accused on the deposition of a single witness if it is found to be fully

D reliable. In the second category also there is no difficulty in arriving at an appropriate conclusion for there is no question of placing any reliance upon the deposition of a wholly unreliable witness. It is only in the case of witnesses who are neither wholly reliable nor wholly unreliable that the Courts have to be

E circumspect and have to look for corroboration in material particulars by reliable testimony direct or circumstantial.

13. To the same effect is the decision of this Court in *Lallu Manjhi v. State of Jharkhand*, (AIR 2003 SC 854) where this

F Court felt that the testimony of the witness Mannu (PW9) could neither be totally discarded nor implicitly accepted. Mannu was a witness who could have been naturally present with his brother while ploughing the field. However, his testimony was found to have been improved substantially at the trial. He was

G considered neither wholly reliable nor wholly unreliable.

14. In the present case the testimony cannot be wholly reliable or wholly unreliable. He is not a chance witness who had no reason to be found near the deceased at the time of the occurrence. There is evidence to show that Palani (PW7)

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used to sleep with the deceased-Senthil in the verandah of the house. What makes it suspect is that the witness has, despite being a natural witness, made a substantial improvement in the version without their being any acceptable explanation for his silence in regard to the fact and matters which was in his knowledge and which would make all the difference in the case. The Court would, therefore, look for independent corroboration to his version, which corroboration is not forthcoming. All that is brought on record by the prosecution is the presence of a strong motive but that by itself is not enough to support a conviction especially in a case where the sentence can be capital punishment. In *N.J. Suraj v. State represented by Inspector of Police* (2004) 11 SCC 346, the prosecution case was based entirely upon circumstantial evidence and a motive. Having discussed the circumstances relied upon by the prosecution, this Court rejected motive which was the only remaining circumstance relied upon by the prosecution stating that the presence of a motive was not enough for supporting a conviction, for it is well-settled that the chain of circumstances should be such as to lead to an irresistible conclusion, that is incompatible with the innocence of the accused. To the same effect is the decision of this Court in *Santosh Kumar Singh v. State through CBI*. (2010) 9 SCC 747 and *Rukia Begum v. State of Karnataka* AIR 2011 SC 1585 where this Court held that motive alone in the absence of any other circumstantial evidence would not be sufficient to convict the appellant. Reference may also be made to the decision of this Court in *Sunil Rai @ Pua and Ors. v. Union Territory, Chandigarh* (AIR 2011 SC 2545). This Court explained the legal position as follows :

“In any event, motive alone can hardly be a ground for conviction. On the materials on record, there may be some suspicion against the accused but as is often said suspicion, howsoever, strong cannot take the place of proof.”

A 15. Suffice it to say although, according to the appellants
the question of the appellant-Velu having the motive to harm
the deceased-Senthil for falling in love with his sister, Usha did
not survive once the family had decided to offer Usha in
matrimony to the deceased-Senthil. Yet even assuming that the
B appellant-Velu had not reconciled to the idea of Usha getting
married to the deceased-Senthil, all that can be said was that
the appellant-Velu had a motive for physically harming the
deceased. That may be an important circumstance in a case
based on circumstantial evidence but cannot take the place of
conclusive proof that the person concerned was the author of
C the crime. One could even say that the presence of motive in
the facts and circumstances of the case creates a strong
suspicion against the appellant but suspicion, howsoever
strong, also cannot be a substitute for proof of the guilt of the
D accused beyond a reasonable doubt.

16. In the totality of the circumstances, we are of the view
that the prosecution has not proved its case against the
appellants who are, in our opinion, entitled to acquittal giving
them the benefit of doubt. In the result, these appeals succeed
E and are hereby allowed. The appellants shall stand acquitted
of the charges framed against them giving them the benefit of
doubt.

K.K.T.

Appeals allowed.